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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 FRANCISCO GONZALEZ ,
15 Defendant.

Case No.: 14-CR-1445-L-1

**ORDER DENYING MOTION FOR
MODIFICATION OF TERM OF
IMPRISONMENT PURSUANT TO
18 U.S.C. § 3582(c)(1)(A)) [ECF NO
46.]**

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17 Petitioner Francisco Gonzalez (“Petitioner”), proceeding *pro se*, filed a motion for
18 relief of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A) requesting a reduction in the
19 term of his custodial sentence to time-served based on the threat posed by the COVID-19
20 pandemic and his underlying health conditions. (Motion [ECF NO 46.]) The
21 Government filed a Response and Opposition to the Motion on March 22, 2021. (Oppo.
22 [ECF No. 49.]) Defendant filed a Reply on April 26, 2021. (Reply [ECF No. 54.])
23 Defendant’s Motion is denied for the following reasons.

24 **I. BACKGROUND**

25 Petitioner pled guilty to one count of possession of methamphetamine with intent
26 to distribute in violation of 18 U.S.C. §§ 841(a)(1) contained in a Superseding
27 Indictment. On April 14, 2015, this Court sentenced Petitioner to 120 months in the
28 custody of the Bureau of Prisons, with a 5-year term of supervised release to follow.

1 Defendant is incarcerated at United States Penitentiary Canaan (“Canaan”) and, as
2 of March 1, 2021, had served about 82 months of the original sentence. Defendant is
3 expected to be released on good time credit on May 13, 2023.

4 II. ANALYSIS

5 A court may modify a defendant's sentence “after considering the factors set forth
6 in § 3553(a) to the extent applicable” if it finds that (i) “extraordinary and compelling
7 reasons warrant the reduction;” (ii) “the defendant is not a danger to the safety of any
8 other person or to the community, as provided in 18 U.S.C. § 3142(g);” and (iii) “the
9 reduction is consistent with this policy statement.” § 3582(c)(1)(A)(i); U.S.S.G. §
10 1B1.13. The First Step Act was enacted in December 2018, with the stated intention of
11 increasing the availability and use of compassionate release for certain individuals. *See*
12 Pub. L.No. 115-391 § 603(b)(titled “INCREASING THE USE AND TRANSPARENCY
13 OF COMPASSIONATE RELEASE”). Importantly, the Act paved the way for defendants
14 to file compassionate release motions directly with the court, as opposed to relying on the
15 Bureau of Prisons (“BOP”) to file those motions on their behalf. *Id.*

16 A. Exhaustion of Administrative Remedies

17 A court may modify a defendant's sentence “upon motion of the defendant after the
18 defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of
19 Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the
20 receipt of such a request by the warden of the defendant's facility, whichever is earlier.”
21 18 U.S.C. § 3582(c)(1)(A); Pub. L.No. 115-391, 132 Stat. 5194, §603.

22 The Government argues that Defendant has not alleged, or provided evidence, that
23 he filed a request for relief from the warden, nor has a request for documentation from
24 the facility demonstrated any request for compassionate release made to the warden.
25 (Oppo. at 10). Defendant responds that he was not required to exhaust administrative
26 remedies, and cites *United States v. Zukerman*, 451 F.Supp. 3d 329 (S.D. New York,
27 April 3, 2020), *United States v. Zullo*, 976 F.3d 228 (2nd Cir. 2020) and *United States v.*
28 *Gunn*, 980 F.3d 1178 (7th Cir. 2020) in support. (Reply at 2).

1 Administrative exhaustion is mandatory before a court may consider the merits of
2 a petition under section 3582. *United States v. McGreggor*, 2020 WL 9602344 (9th Cir.
3 Oct. 26, 2020)(“[M]andatory exhaustion statutes ... establish mandatory exhaustion
4 regimes, foreclosing judicial discretion.”(internal citations omitted).) Here, Defendant
5 has not provided evidence that he presented his request to the warden, instead contending
6 that the exhaustion requirement should be waived. (Reply at 3-4). The cases Defendant
7 cites are not binding on this Court, and do not provide support for his request. In
8 *Zukerman*, the district court excused the exhaustion requirement for a 75-year-old
9 defendant with significant underlying health issues who sought compassionate release.
10 *Zukerman*, 451 F.Supp. 3d at 333. The court relied on Second Circuit authority which
11 held that the exhaustion requirement is not absolute where a defendant can demonstrate
12 exhaustion would be futile, the process would be incapable of granting adequate relief, or
13 exhaustion would subject the defendant to undue prejudice. *Id.* While informative,
14 *Zukerman* is not binding authority, and even if it was, the case does not assist Defendant
15 who has not demonstrated similar circumstances.

16 The additional cases Defendant cites, *Zullo* and *Gunn*, address the applicability of
17 the Sentencing Commission’s policy statement to the determination of extraordinary and
18 compelling reasons, not the exhaustion requirement. *Zullo*, 976 F.3d at 237; *Gunn*, 980
19 F.3d 1181. Therefore, even if they were binding authority, they are not helpful to
20 Defendant. Defendant has not satisfied the exhaustion requirement under § 3582,
21 therefore, the motion may be dismissed on these grounds.

22 B. *Extraordinary and Compelling Reasons*

23 Even if Defendant had exhausted his motion, or the exhaustion requirement was
24 waived, he cannot prevail on the merits of his motion.

25 Defendant argues that the Court should grant his request because he has high blood
26 pressure, high cholesterol, breathing problems, hyperlipidemia, and is obese, all of which
27 greatly increases his chance of serious illness or death from COVID-19. (Mot. at 8). He
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1 contends these medical conditions constitute “extraordinary and compelling reasons” for
2 the relief he seeks. (Mot. at 1).

3 The Government opposes Defendant’s request, arguing that his medical records do
4 not indicate he has any current issues with “untreated high blood pressure, high
5 cholesterol, breathing problems, or hyperlipidemia.” (Opposition at 11). The
6 Government agrees that Defendant’s obesity qualifies as an “extraordinary and
7 compelling reason,” but notes that many courts have concluded that obesity on its own, is
8 not sufficient to qualify as an extraordinary and compelling reason to grant relief. (*Id.* at
9 11-13). In addition, Defendant has now been fully vaccinated against COVID-19,
10 therefore, the Government argues that his chances of acquiring the virus or suffering
11 severe consequences if he does get the virus, are significantly reduced. (*Id.* at 14-15).

12 The Ninth Circuit recently held in *Aruda*, that section 1B1.13 “may inform a
13 district court’s discretion for § 3582(c)(1)(A) motions filed by a defendant,” even though
14 it is no longer considered a binding policy statement regarding the criteria that qualify as
15 “extraordinary and compelling reasons.” *See United States v. Aruda*, 2012 WL 1307884
16 (9th Cir. April 8, 2021). The Court looks to the Policy Statement for guidance. First, a
17 defendant who is suffering from a terminal illness, such as “metastatic solid-tumor
18 cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, [or] advanced
19 dementia” may qualify. U.S.S.G. § 1B1.13, cmt. n.1 (A)(i). Second, a defendant can
20 meet the standard if he or she is:

- 21 (I) suffering from a serious physical or medical condition,
- 22 (II) suffering from a serious functional or cognitive impairment, or
- 23 (III) experiencing deteriorating physical or mental health because of the
24 aging process,
25 that substantially diminishes the ability of the defendant to provide self-care
26 within the environment of a correctional facility and from which he or she is
27 not expected to recover.

28 U.S.S.G § 1B1.13, cmt. n.1(A)(ii). Third, a defendant may qualify on the basis of age if
he or she is (1) at least 65 years old; (2) experiencing “a serious deterioration in physical

1 or mental health because of the aging process”; and (3) has served at least 10 years or
2 75% of the sentence, whichever is less. U.S.S.G. §1B1.13, cmt. n.1(B). Fourth, certain
3 family circumstances may be considered extraordinary and compelling. U.S.S.G. §
4 1B1.13, cmt. n.1(C). Last, the Commission provides that the BOP may identify “other
5 reasons” that qualify as “extraordinary and compelling” reasons “other than, or in
6 combination with, the reasons described in subdivisions (A) through (C).” U.S.S.G. §
7 1B1.13 cmt. n.1(D).

8 According to the CDC, individuals who are categorized as obese have an increased
9 risk of severe illness with COVID-19, and “[t]he risk of severe COVID-19 illness
10 increases sharply with elevated BMI.”¹ The CDC defines obesity as a BMI of 30 or
11 higher, and further classifies obesity of a BMI of 40 or higher as Class 3, “severe” or
12 “extreme.”² Defendant is 68 inches tall and weighed 228 pounds on March 10, 2021,
13 resulting in a Body Mass Index (BMI) of approximately 34. (Gov. Ex 1 at 1). Although
14 BMI can be an indicator of a defendant’s vulnerability to severe illness from COVID-19,
15 it is not necessarily an accurate reflection of a defendant’s overall risk. As other courts
16 have reasoned, obesity on its own, without any medical conditions resulting from the
17 elevated BMI, can be insufficient to demonstrate extraordinary and compelling reasons to
18 grant relief. See *United States v. Santillan-Lares*, 18cr4935 BTM (S.D. Cal October 7,
19 2020)(where records “support only the obesity diagnosis but none of the other conditions
20 alleged... [t]he Court accordingly does not find extraordinary and compelling reasons
21 justifying release); *United States v. Weller*, 12cr5154 W (S.D. Cal. November 20,
22 2020)(obesity “with no other serious resulting conditions, fails to persuade the Court that
23 it qualifies as ‘extraordinary and compelling’); *United States v. Ocegunda*, 12cr509 CAB
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26 ¹ [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-
27 medical-conditions.html#obesity](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#obesity)

28 ² See <https://www.cdc.gov/obesity/adult/defining.html>.

1 (S.D. Cal. January 27, 2021)(obesity with hypertension did not qualify where “[t]here is
2 no indication that [defendant’s] excess weight has caused any additional medical issues
3 or has had an adverse effect on her overall health”); *United States v. Tranter*, 471 F.Supp.
4 3d 861 (N.D. Ind. July 8, 2020)(“Tranter has identified no current medical issues
5 resulting from his obesity, indicating to the Court that it has little adverse effect on his
6 overall health.”)

7 A review of Defendant’s medical records indicates that he is a 39-year-old male
8 with no untreated medical conditions that would put him at a higher risk of serious illness
9 or death from COVID-19, other than his obesity. In addition, he has been fully vaccinated
10 against the COVID-19 virus. Defendant argues that although he has been vaccinated, the
11 prison environment makes social distancing impossible and that it is “only a matter of
12 time before [he] is contaminated.” (Reply at 3.) The COVID-19 vaccine provides
13 significant protection against contracting the virus and lessens symptoms for those who
14 still get the virus, which eliminates the risk of serious illness or death to Defendant now
15 that he has been fully vaccinated. See CDC, *When You’ve Been Fully Vaccinated*,
16 available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html>.
17 Although Defendant’s obesity is a factor the Court considers, it is insufficient to qualify
18 on its own as an extraordinary and compelling reason to grant relief under these
19 circumstances.

20 *B. Danger to the Community*

21 The Court must also determine whether granting Defendant’s request would result
22 in a danger to “any other person or to the community.” 18 U.S.C. § 3142(g). The Court
23 makes this assessment by addressing the factors set forth in § 3142(g), including, among
24 other things: (1) the nature and circumstances of the offense charged; (2) the history and
25 characteristics of the person, including character, physical and mental condition, family
26 ties, employment, financial resources, past conduct, criminal history, and drug and
27 alcohol abuse; and (3) the nature and seriousness of the danger to any person or the
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1 community that release would impose. 18 U.S.C. § 3142(g). The Court considers each in
2 turn.

3 Defendant claims that he has maintained strong family and community ties while
4 incarcerated, he has logged over 700 hours of education, earned his GED, become
5 proficient in English, and is now a “matured man who poses no risk to the community.”
6 (Mot. at 8). He plans to live with his mother, wife and children if granted relief. (*Id.*)

7 The Government argues that Defendant poses a danger to the safety of the
8 community because he has gang affiliations, is in the highest criminal history category,
9 and had poor performance on supervision. (Oppo. at 16).

10 Defendant was convicted in the present case for possession of methamphetamine
11 with intent to distribute, an extremely dangerous controlled substance. Between 2000 and
12 2010, Defendant was arrested for multiple crimes, including carjacking, robbery, battery,
13 vandalism, possession of a firearm by a felon, and possession of paraphernalia used for
14 narcotics, among others. (PSR at 8-12). Defendant was also affiliated with the Mission
15 Bay Locos gang. (*Id.* at 9). In 2009, Defendant was convicted of possession of
16 methamphetamine and drug paraphernalia, which resulted in prison time after probation
17 was revoked. (PSR at 11).

18 As a general matter, drug trafficking creates a danger to the community, not only
19 through the distribution of addictive controlled substances, but also tangentially through
20 the potential for crimes committed by addicts to support their habits. *United States v.*
21 *Lopez-Ontiveros*, No 15cr575 GPC (S.D.Cal. October 6, 2020); *United States v.*
22 *Banuelos*, No. 16cr1008 BAS (S.D. Cal. October 23, 2020). Defendant’s conviction for
23 importation of methamphetamine is a non-violent drug offense, however, he has a history
24 of violence, a factor this Court considers. Defendant also has a history of drug use and
25 gang affiliation. He has not been successful on probation in the past. He also notes that he
26 has had a clean prison record since 2018, indicating struggles with prison discipline up to
27 that point. Weighing the above factors, the Court finds that Defendant would be a danger
28 to the safety of other persons or to the community upon release.

1 C. § 3553(a) Factors

2 Under Section 3553(a), a sentencing court must impose a sentence that is
3 “sufficient, but not greater than necessary, ... (A) to reflect the seriousness of the offense,
4 to promote respect for the law, and to provide just punishment for the offense; (B) to
5 afford adequate deterrence to criminal conduct; (C) to protect the public from further
6 crimes of the defendant; and (D) to provide the defendant with needed educational or
7 vocational training, medical care, or other correctional treatment in the most effective
8 manner[.]” 18 U.S.C. § 3553(a)(2)(A)-(D). In addition to other factors, the sentencing
9 court must also consider, “the nature and circumstances of the offense and the history and
10 characteristics of the defendant” and the “need to avoid unwarranted sentence disparities
11 among defendants with similar records who have been found guilty of similar conduct[.]”
12 § 3553(a)(1), (6). Section 3142(g) encompasses some of these factors, as noted above.

13 Defendant argues that the 3553(a) factors weigh in favor of the Court granting his
14 request for a time-served sentence because he has rehabilitated himself during the more
15 than nine years he has been confined. He has completed over 700 hours of education,
16 achieving his GED, and developing business skills. (Mot. at 8). He has been a facilitator
17 for Alternative to Violence Project seminars, and has been a volunteer tutor to other men.
18 (*Id.*) Defendant states that he was endorsed for the RDAP program in June 2020, but has
19 been unable to participate due to the COVID-19 pandemic. (Reply at 5).

20 In response, the Government argues that the §3553(a) factors do not support a
21 sentence reduction, noting that Defendant has had gang affiliations, is in the highest
22 criminal history category of VI, and that he needs to participate in the RDAP program for
23 its important rehabilitative benefit. (Oppo. at 8).

24 As noted above, Defendant’s conviction for possession of methamphetamine with
25 intent to distribute involved an extremely dangerous controlled substance. In addition,
26 Defendant was previously affiliated with a street gang, and his criminal history garnered
27 him the highest score possible, a VI. Defendant is to be commended for the completion of
28 his GED, becoming proficient in English, and finishing a significant number of education

1 courses while incarcerated. In addition, his participation in the Alternative to Violence
2 Project and tutoring other inmates indicates a path to leadership roles. As Defendant
3 notes, he has now been approved for the RDAP program, a significant step in his
4 rehabilitation. If the Court were to sentence him to time-served at this time, he would
5 miss out on this important rehabilitative opportunity. While Defendant has made great
6 strides in his education and leadership roles, the Court must balance the need for
7 rehabilitation against the need for sufficient punishment for the offense. Accordingly, the
8 Court finds that reducing Defendant's sentence to time-served is not supported by the
9 §3553(a) factors.

10 **III. CONCLUSION**

11 For the foregoing reasons, the Court **DENIES** Petitioner's motion without
12 prejudice.

13 **IT IS SO ORDERED.**

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15 Dated: July 1, 2021

16 
17 Hon. M. James Lorenz
18 United States District Judge
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